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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 253

PHIL WHITUS AND LEON DAVIS,

Petitioners

VS.

STATE OF GEORGIA,

Respondent

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia under review here, and which affirmed a ruling of the trial court denying petitioners' challenge to the array of grand jurors, is reported as *Whitus* v. *State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965), cert. granted, 384 U.S. 1000, 16 L. Ed. 2d 1014 (1966). Previous decisions of the Supreme Court of Georgia affirming the first conviction of petitioners are reported as *Davis* v. *State,* 216 Ga. 110,

114 S.E. 2d 877 (1960), and *Whitus* v. *State,* 216 Ga. 284, 116 S.E. 2d 205 (1960), cert. den. 365 U.S. 831, 5 L. Ed. 2d 708 (1961). The decision of the Court of Appeals for the Fifth Circuit refusing to set aside the first conviction on habeas corpus, is reported as *Whitus* v. *Balkcom,* 299 F. 2d 844 (C.A. 5th 1962), vacated and remanded, 370 U.S. 728, 8 L. Ed. 2d 803 (1962). On remand, that Court set aside the first conviction. *Whitus and Davis* v. *Balkcom,* 333 F. 2d 496 (C.A. 5th 1964), cert. den. 379 U.S. 931, 13 L. Ed. 2d 343 (1964). Subsequent to rendition of the decision under review, petitioners were tried, convicted, and sentenced to death. The opinions of the Supreme Court of Georgia affirming those convictions are reported as *Whitus* v. *State,* 222 Ga. 103, 149 S.E. 2d 130 (1966), reh. den. May 5, 1966; *Davis* v. *State,* 222 Ga. 114, 149 S.E. 2d 130 (1966) reh. den. May 5, 1966. Petition for certiorari is now pending with respect to these decisions (No. 519 Misc.).

JURISDICTION

Petitioners rely upon 28 U.S.C., Sec. 1257 (3). Respondent denies that jurisdiction exists, for the reason that the judgment sought to be reviewed is not final.

QUESTIONS PRESENTED

(1) Whether a decision of a state court overruling a challenge to the array of grand jurors in a criminal case is a final judgment subject to review under 28 U.S.C.A., Sec. 1257 (3).

(2) Whether murder indictments of the two Negro defendants should be abated because of alleged racial discrimination in the selection of the grand jury, alleged to consist of (a) A disproportionate number of Negroes

on the grand jury as compared to the Negro population of the County; and (b) The existence of state statutes requiring that the names of prospective jurors be selected from the county tax digest, and that the names of colored and white taxpayers be made out separately on the tax digest.

(3) Whether, assuming the indictments should be set aside for either or both of the reasons above stated, the petitioners should stand discharged and acquitted, or should be held for reindictment and retrial.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

These are as set forth in Petitioners' Brief.

STATEMENT

Petitioners were indicted for murder at the 1960 January Term of Mitchell County, Georgia, Superior Court. They were tried, convicted, and sentenced to death. These convictions were affirmed on appeal by the Supreme Court of Georgia. *Davis* v. *State,* 216 Ga. 110, 114 S.E. 2d 877 (1960); *Whitus* v. *State,* 216 Ga. 284, 116 S.E. 2d 205 (1960). This Court denied certiorari, 365 U.S. 831, 5 L. Ed. 2d 708 (1961).

Habeas corpus was then instituted in the United States District Court for the Southern District of Georgia, raising for the first time the contention that racial discrimination had been practiced in the selection of the grand jury indicting petitioners and the petit jury trying them. Relief was denied, and the Court of Appeals for the Fifth Circuit affirmed. *Whitus* v. *Balkcom,* 299 F. 2d 844 (C.A. 5th 1962), remanded, *Whitus* v. *Balkcom,* 370

U.S. 728, 8 L. Ed. 2d 803 (1962). On remand, the district court again denied relief, but the Fifth Circuit reversed. *Whitus and Davis* v. *Balkcom,* 333 F. 2d 496 (C.A. 5th 1964). Noting that the state had conceded the question of discrimination, but relied instead on waiver,[1] the Fifth Circuit held, applying the rational of *Fay* v. *Noia,* 372 U.S. 391, 9 L. Ed. 2d 837 (1964), that waiver could not be imputed from the failure of court-appointed counsel to raise the issue at the trial. The Court reasoned that Negro defendants could not constitutionally be put to the choice of choosing between a jury improperly constituted and one prejudiced by the challenge being made in their presence. With respect to a retrial, the Court held:

> "As in Goldsby and Seals, the Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State an opportunity to take the necessary steps to reindict and retry the petitioners. Any such reindictment must of course be by a grand jury from which Negroes have not been systematically excluded, and any such retrial must be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate the petitioners' constitutional rights. For the guidance of the parties, the Court expresses the present opinion that if petitioners are reindicted and retried and if any question

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[1]As stated by the Fifth Circuit: "The factual question of the existence of the custom of systematic exclusion of Negroes from the Mitchell County juries is not at issue. The Appellee relies solely on the doctrine of waiver." *Whitus* v. *Balkcom,* supra.

> should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Georgia, subject to possible review by the Supreme Court of the United States." 333 F. 2d at 510.

This decision was rendered June 18, 1964. This Court denied certiorari, 379 U.S. 931, 13 L. Ed. 2d 343 (1964). Judgment was entered on the mandate by the district court on January 18, 1965.

Mitchell Superior Court convenes in regular term only twice each year, in April and October,[2] and alleging that the case was to be submitted to a newly-impaneled grand jury at the 1965 April term, petitioners filed challenge to the array of grand jurors on April 10, 1965. The challenge was heard on April 16, prior to the trial.[3] By way of evidence, petitioners relied upon testimony tending to show that prior to the April Term, 1965, no Negro, with the possible exception of one, had ever served on the grand jury, (R. 8-21) and the census figures showing that of the 10,206 persons in Mitchell County over 21 years of age, 4,480 were colored. The state's evidence, however, showed that, pursuant to the

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[2]See Ga. Laws 1966, p. 3498.

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[3]In Georgia, the first week of a term of superior court customarily is devoted to civil cases and grand jury deliberations. The grand jury usually completes its work during the first week, and the second week is devoted to the trial of criminal cases, both those indicted the preceding week as well as those pending from prior terms. The challenge to the array of grand jurors was presented at the beginning of the first week when the grand jury was convened.

mandate of the Fifth Circuit, the jury commissioners had revised the jury lists in February of that year (R. 26). At the April Term, of the 33 jurors drawn for grand jury service, 2 were Negroes, but one did not appear[4] and only one actually served (R. 38). Of the 90 jurors called for the traverse jury, at lease seven were Negroes.[5]

Also complained of in the petition for certiorari are the Georgia statutes requiring that the jury lists be made up of names selected from the County tax receiver's records, Code Sec. 59-106, and that the names of colored and white taxpayers be made out separately on the digest. Code Sec. 92-6307. In this connection, the evidence showed that the revised jury lists from which the grand and traverse juries serving at the 1965 April Term were drawn had been selected from the 1964 tax digest as distinguished from the tax returns (R. 21, 27, 33). Prior to the calendar year 1965, the return sheets themselves, furnished all counties by the State Revenue Department, Code Sec. 92-6302, were white for white taxpayers, and yellow for colored taxpayers, (R. 42); however, the jury commissioners were apparently not familiar with this fact (R. 45). Similarly, although the tax receiver, pursuant to Code Sec. 92-6307, placed a "c" by the names of colored taxpayers on the digest (R. 42), the jury commissioners were not even aware of this fact (R. 45-49).

While Georgia law requires that the names of all

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[4]R. 40. A grand jury under Georgia law consists of not less than 18 nor more than 23 persons. Code Sec. 59-202. Traditionally, 30 or so are drawn in anticipation of some not appearing.

[5]It was so stipulated by counsel at the trial in October, subsequent to the decision of the Court of Appeals now under review.

jurors selected by the jury commissioners be placed on the minutes of the Court, Code Sec. 59-109, petitioners made no effort to introduce these minutes into evidence for the purpose of questioning Court officials as to which ones thereon were Negroes, nor was there any effort to prove that there were any substantial number of Negroes whose names appeared on the tax books and who were qualified as to experience, intelligence and uprightness, as required by Georgia law, Code Sec. 59-106. The only evidence as to the number of Negroes on the jury lists came at hearing on the challenge to the array of petit jurors at the trial, where witness W. H. Grogan, a jury commissioner, testified in response to a question from counsel for petitioner Whitus that in his estimate, of the 600 names on the revised jury lists, 25 to 30 per cent were Negro.[6]

The trial judge overruled the challenge to the array of grand jurors, and direct appeal was taken to the Supreme Court of Georgia pursuant to Georgia law permitting interlocutory appeals from judgments which would have been final "if rendered as claimed for." Code Ann. Sec. 6-701. Because of the pendency of these appeals, the cases were not tried at the April term.

The Supreme Court transferred the cases to the Court of Appeals without opinion on May 26, 1965, and on September 8, the Court of Appeals affirmed the ruling of the trial court. *Whitus* v. *State; Davis* v. *State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965). This Court granted

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[6]See testimony of Mr. W. H. Grogan, in the Transcript of Record in the Whitus case, as transmitted to the Supreme Court of Georgia, and with respect to which certiorari is now pending in this Court, No. 519 Misc.

certiorari on June 20, 1966, 384 U.S. 1000, 16 L. Ed. 2d 1014 (1966).

In the meantime, following affirmance by the Court of Appeals of the overruling of the challenge to the array, the cases came on for trial at the October Term, the Davis case being tried on October 18, and the Whitus case on October 19, 1965, resulting in convictions and sentences of death in both cases. With respect to the challenge to the array of petit jurors, the testimony previously adduced in connection with grand jury challenge was stipulated by counsel. Jury Commissioner Campbell also testified to the effect that Negroes constitute approximately 30% of the taxpayers in the County,[7] and that in his estimate, approximately 25 - 30% of the names on the jury lists. There was also testimony that in November, 1959, the jury lists had been revised, and the names of 26 Negroes placed thereon.

The convictions were affirmed by the Supreme Court of Georgia. *Whitus* v. *State,* 222 Ga. 103, 149 S.E. 2d 130 (April 12, 1966), reh. den. May 5, 1966; *Davis* v. *State,* 222 Ga. 114, 149 S.E. 2d 130 (April 19, 1966), reh. den. May 5, 1966.

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[7]Actually, Negroes constitute only 27.1% of the taxpayers in the County, as respondent is informed by the County tax commissioner.

ARGUMENT

(1) The Writ of Certiorari Should Be Dismissed as Improvidently Granted, the Judgment Below Not Being Final.

The decision of the Court of Appeals of Georgia under review here is one which affirmed rulings of the trial court denying challenges to the array of grand jurors filed prior to trial (R. 1).

The trial court rulings were rendered at the 1965 April term of Mitchell Superior Court. Pending review, trial of the cases on the merits was postponed. The Court of Appeals of Georgia rendered its decision on September 22, 1965. *Whitus* v. *State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965). The cases were then tried at the 1965 October term, and petition for certiorari is now pending to review those convictions, No. 519 Misc.

The appeals to the Georgia Court of Appeals from the orders overruling the challenges to the array were taken pursuant to Georgia law, Code Ann. Sec. 6-701, authorizing interlocutory appeals from judgments which "Would have been final if rendered as claimed for."

The jurisdiction of this Court, however, is limited to "Final judgments or decrees rendered by the highest court of a state . . ." 28 U.S.C., Sec. 1257 (3). To be final for purposes of review, the judgment below "must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed." *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546, 91 L. Ed. 1662 (1947). "Thus, the requirement of finality has not been met merely because the major issues in a case have been

decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68, 92 L. Ed. 1212 (1948). The finality requirement is one of power, and is designed to prevent piecemeal review. *Pope* v. *Atlantic Coast Line R. R.,* 345 U.S. 379, 381, 97 L. Ed. 1094 (1953).

"Final judgment in a criminal case, the Court has said, means sentence." *Carey* v. *United States,* 375 U.S. 169, 174, 11 L. Ed. 2d 229 (1963). The overruling of a demurrer ordinarily is not final. *Pope* v. *Atlantic Coast Line R. Co.,* supra. The overruling of a plea in bar is not final for purposes of review. *Heike* v. *United States,* 217 U.S. 423, 54 L. Ed. 821 (1910). The fact that state law permits interlocutory appeals does not confer jurisdiction on this Court. *Holcombe* v. *McKusick,* 61 U.S. (20 How.) 552, 15 L. Ed. 1020 (1858).

(2) Petitioners Failed to Carry the Burden of Showing Systematic Exclusion of Negroes from the Grand Jury.

Since the evidence shows that the jury boxes had been revised prior to selection of the grand jury indicting petitioners, for the express purpose of complying with the mandate of the Court of Appeals for the Fifth Circuit, petitioners were required to show discrimination by way of systematic exclusion as to this particular jury box, and the burden of proof was not carried by proof of long-continued exclusion prior to revision.

In setting aside the first conviction of petitioners, the Court of Appeals for the Fifth Circuit adjudicated that Negroes had been systematically excluded from the

grand and petit juries in Mitchell County, Georgia. This determination was based upon the fact that while Negroes constituted 45% of the population of the County, none had ever served on juries within the memory of witnesses, coupled with a concession by the state as to the existence of discrimination under applicable decisions. *Whitus and Davis* v. *Balkcom*, 333 F. 2d 496 (C.A. 5th, 1964). Therefore, there would be no point in proving a fact already adjudicated.

Following receipt of the mandate by the Superior Court in January, 1965, and pursuant thereto, the jury commissioners of Mitchell County revised the jury lists in February. Of the 33 jurors drawn for grand jury service at the April Term at which petitioners were indicted, 3 were Negroes, one of whom actually served on the grand jury. Of the 90 jurors drawn for the October, 1965 term at which petitioners were tried, at least 7 were Negroes. Under Georgia law, the 6 jury commissioners appointed by the judge of the superior court, Ga. Code Sec. 59-101, select the names of jurors for the jury boxes (rolls) from the books of the tax receiver, viz.:

> "Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.
>
> The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon

other tickets. The entire number first selected, including these afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead." Ga. Code Sec. 59-106.

The names so selected are placed in jury boxes, Ga. Code Sec. 59-108, and also entered on the minutes of the Superior Court. Code Sec. 59-109. Names are drawn from the boxes each term to make up the venire. Code Secs. 59-203, 59-701, 59-801.

The qualifications for jurors under Georgia law are as set forth in Sec. 59-106, quoted above. Additional qualifications are specified for grand jury service.[8] Women are also qualified, but not compellable, to serve as jurors, and may notify the jury commissioners of their desire not to serve. Code Sec. 59-124. Other classes of persons are exempt, but not disqualified from serving, such as ministers, teachers, physicians, etc. Code §59-112.

"Whenever by any action of a state, whether through

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[8]Code Sec. 59-201 provides: "All citizens of this State, above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent, and upright persons, are qualified and liable to serve as grand jurors, unless exempted by law: Provided, however, that county commissioners, tax receivers, tax collectors, members of the county board of education, county school commissioners, ordinaries, and county treasurers shall be incompetent to serve as grand jurors during their respective terms of office."

its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as . . . jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States." *Carter* v. *Texas,* 177 U.S. 442, 447, 44 L. Ed. 839 (1900). "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." *Patton* v. *Mississippi,* 332 U.S. 463, 469, 92 L. Ed. 76 (1947). However, discrimination must be proven by evidence. *Smith* v. *Mississippi,* 162 U.S. 592, 601, 40 L. Ed. 1082 (1896); *Carter* v. *Texas,* 177 U.S. 442, 447, 44 L. Ed. 839 (1900); *Brownfield* v. *South Carolina,* 189 U.S. 426, 47 L. Ed. 882 (1903); *Akins* v. *Texas,* 325 U.S. 398, 89 L. Ed. 1692 (1945); *Martin* v. *Texas,* 200 U.S. 316, 50 L. Ed. 497 (1906); *Franklin* v. *South Carolina,* 218 U.S. 161, 167, 54 L. Ed. 980 (1910). "But such an actual discrimination is not presumed. It must be proved or admitted." *Tarrance* v. *Florida,* 188 U.S. 519, 520, 47 L. Ed. 572 (1902); *Akins* v. *Texas,* supra. "Also, where discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant." *Fay* v. *New York,* 332 U.S. 261, 285, 91 L. Ed. 2043 (1947); *Akins* v. *Texas,* supra; *Hoyt* v. *Florida,* 368 U.S. 57, 69, 7 L. Ed. 2d 118 (1961); *Swain* v. *Alabama,* 380 U.S. 202, 226, 13 L. Ed. 2d 759 (1965).

While token inclusion does not satisfy the Constitu-

tion, *Brown* v. *Allen*, 344 U.S. 443, 471, 97 L. Ed. 469 (1953); *Smith* v. *Texas*, 311 U.S. 128, 130, 85 L. Ed. 84 (1940); *Billingsley* v. *Clayton*, 359 F. 2d 13 (C.A. 5th 1966); the mere fact that there are no Negroes on the grand or petit jury in a given case does not establish discrimination, *Virginia* v. *Rives*, 100 U.S. 313, 25 L. Ed. 667 (1880); *Bush* v. *Kentucky*, 107 U.S. 110, 117, 27 L. Ed. 354 (1883); *Martin* v. *Texas*, 200 U.S. 316, 320, 50 L. Ed. 497 (1906); *Akins* v. *Texas*, supra (325 U.S. at 403); *Hoyt* v. *Florida*, 368 U.S. 57, 7 L. Ed. 2d (1961); *Fay* v. *New York*, 332 U.S. 261, 285, 91 L. Ed. 2043 (1947), for "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury." *Hoyt* v. *Florida*, supra. An accused is not entitled to demand proportional representation of his race on the jury in his case. *Thomas* v. *Texas*, 212 U.S. 278, 53 L. Ed. 512 (1909); *Akins* v. *Texas*, supra; *Swain* v. *Alabama*, supra (380 U.S. at 208); *Fay* v. *New York*, supra (332 U.S. at 291); *Cassell* v. *Texas*, 339 U.S. 282, 291, 94 L. Ed. 839 (1950); *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (C.A. 5th), *cert. den.* 361 U.S. 838, 4 L. Ed. 2d 78 (1959); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53 (C.A. 5th 1962), *cert. den.* 372 U.S. 924, 9 L. Ed. 2d 729 (1963); *Scott* v. *Walker*, 358 F. 2d 56 (C.A. 5th 1966); *Billingsley* v. *Clayton*, 359 F. 2d 13 (C.A. 5th 1966). Indeed, he is not even entitled to demand that any member of his race serve. *Strauder* v. *West Virginia*, 100 U.S. 303, 305, 25 L. Ed. 664 (1880); *Virginia* v. *Rives*, 100 U.S. 313, 25 L. Ed. 667 (1880); *Neal* v. *Delaware*, 103 U.S. 370, 26 L. Ed. 567 (1881); *Bush* v. *Kentucky*, supra; *Wood* v. *Brush*, 140 U.S. 278, 285, 35 L. Ed. 505 (1891); *Jugiro* v. *Brush*, 140 U.S. 291, 297, 35 L. Ed. 510 (1891); *Akins* v. *Texas*, supra.

Where as here, prior discrimination was laid bare, and a revision took place, what transpired before revision is irrelevant. *Cassell* v. *Texas,* 339 U.S. 282, 94, L. Ed. 839 (1950); *Akins* v. *Texas,* 325 U.S. 398, 89 L. Ed. 1692 (1945). "Former errors cannot invalidate future trials .... It is this particular box that is decisive." *Brown* v. *Allen,* 344 U.S. 443, 479, 97 L. Ed. 469 (1953). In this respect, the evidence in this case discloses that the boxes were revised in February before the reindictment of petitioners in April and their retrial in October. Three Negroes were on the grand jury venire, and at least 7 were on the petit jury venire. Although Negroes constitute 45% of the county population, they constitute only 27.1% of the names on the tax digest from which jurors are selected.[9] Counsel for both petitioners elicited from a jury commissioner his estimate that Negroes constituted 25 or 30 per cent of the names in the jury boxes after revision, although the witness stated that it could be higher.[10] Counsel for petitioners made no effort to secure the minutes of the Court for the purpose of submitting the jury lists to the commissioners or other Court officials and asking them on the witness stand to identify the Negro jurors thereon. The disparity between the percentage of Negro taxpayers and the percentage in the jury box could well be explained by the difference in

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[9]Information furnished by Hon. Elwood Williams, Tax Commissioner of Mitchell County. At the trial of petitioners in October, 1965, subsequent to the decision now under review, witness W. H. Grogan estimated that Negroes constituted 30% of the taxpayers.

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[10]Id.

the relative qualifications of the two races.[11] "We recognize the fact that these lists have a higher proportion of white citizens than of colored, doubtless due to inequality of educational and economic opportunities." *Brown* v. *Allen*, 344 U.S. 443, 473, 97 L. Ed. 469 (1953), and see *Swain* v. *Alabama*, supra (380 U.S. at 208).

Here, the jury commissioners testified that in revising the boxes pursuant to directions of the trial judge who pointed out the requirements imposed by previous litigation, they did not consider race or color. While the "mere, general assertions by officials of their performance of duty" is not sufficient to overcome the evidence of long continued exclusion where Negroes constitute a substantial proportion of the population and many are seen to be qualified, *Norris* v. *Alabama*, 294 U.S. 587, 598, 79 L. Ed. 1074 (1935); *Smith* v. *Texas*, 311 U.S. 128, 85 L. Ed. 84 (1940); *Hernandez* v. *Texas*, 347 U.S. 475, 481, 98 L. Ed. 866 (1954); *Reece* v. *Georgia*, 350 U.S. 85, 88, 100 L. Ed. 77 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584, 589, 2 L. Ed. 2d 991 (1958), such statements are accorded weight where not rebutted nor deemed improbable. *Brown* v. *Allen*, 344 U.S. 443, 481, 97 L. Ed. 469 (1953); *Fay* v. *New York*, 332 U.S. 261, 277, 91 L. Ed. 2043 (1947); *Moore* v. *New York*, 333 U.S. 565, 568, 92 L. Ed. 881 (1948).

The Negro representation here compares favorably with that upheld in *Swain* v. *Alabama*, supra; *Brown* v.

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[11]Mitchell County has 2124 non-white citizens 25 years of age or older who are functionally illiterate. See United States Census of Population, 1960, Georgia, General Social and Economic Characteristics, U. S. Department of Commerce, Bureau of the Census, PC(1) 12c Ga., p. 339.

Allen, supra, and in *Billingsley* v. *Clayton*, 359 F. 2d 13 (C.A. 5th 1966). The evidence shows that the jury boxes had been revised and that Negroes are now serving. There was no effort to prove that any larger percentage of Negroes were qualified for jury service. Petitioners simply sought to rely on evidence of past discrimination prior to revision, but as we have before shown, this is irrelevant. Petitioners simply failed to carry the burden.

Insofar as it is contended that the Georgia jury selection statutes are unconstitutional for failure to prescribe standards, it is enough to say, as this Court did in *Fay* v. *New York*, 332 U.S. 261, 272, 91 L. Ed. 2043 (1947):

> "It has consistently been held that a jury is not rendered constitutionally invalid by failure of the statute to set forth any standards for selection."

See also, in accord, *Murray* v. *Louisiana*, 163 U.S. 101, 108, 41 L. Ed. 87 (1896); *Ex parte Virginia*, 100 U.S. 339, 348, 25 L. Ed. 667 (1879); *Franklin* v. *South Carolina*, 218 U.S. 161, 168, 54 L. Ed. 980 (1910); *Akins* v. *Texas*, 325 U.S. 398, 403, 89 L. Ed. 1692 (1945).

(3) The Use by the Jury Commissioners of the Tax Digest, Required by Law to List Negro Taxpayers Separately, Affords No Basis for Constitutional Attack.

Under Georgia law, the names of jurors are selected from the books of the county tax receiver. Ga. Code Sec. 59-106. With respect to the books of the tax receiver, Ga. Code Sec. 92-6307, prior to repeal in 1966 (Ga. Laws 1966, p. 393), provided:

> "The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order.

> Names of colored and white taxpayers shall be made but separately on the tax digest."

The evidence here showed that the revised jury list was taken from the "tax digest" as distinguished from the "returns" made by individual taxpayers, the digest being a consolidation of the later (R. 21, 27, 33). Prior to 1965, the tax return sheets furnished by the State Revenue Department to the counties were white for white taxpayers, and yellow for Negro taxpayers. Since the return sheets were not used in making up the jury lists, this practice is constitutionally irrelevant as far as this case is concerned. In any event, the evidence shows that the jury commissioners were not even aware of it, and the practice was discontinued in 1965.

The tax digests for the races are separate, however, and it is this fact, coupled with the requirement that the jury lists be made from the tax records, that petitioners assail as being unconstitutional on the ground that it "provides unnecessary opportunities for discrimination," citing *Avery* v. *Georgia,* 345 U.S. 559, 97 L. Ed. 1244 (1953).

A similar contention was rejected in *Maxwell* v. *Stephens,* 348 F. 2d 325 (C.A. 8th 1965); *Harris* v. *Stephens,* 361 F. 2d 888, 892 (C.A. 8th 1966).

The validity of Code Sec. 92-6307 if attacked in a direct proceeding by way of injunction is not at issue here. See *Anderson* v. *Martin,* 375 U.S. 899, 11 L. Ed. 2d 439 (1964); *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E.D. Va.), *aff'd. sub nom. Tancil* v. *Woolls,* 379 U.S. 19, 13 L. Ed. 2d 91 (1964). The question is whether under the facts of this case, the

practice is seen to be harmful, for harmless error is no ground for complaint. Cf. Rule 61, Fed. Rules Civ. Proc.

In *Avery* v. *Georgia*, supra, and in *Williams* v. *Georgia*, 349 U.S. 375, 99 L. Ed. 1161 (1955), this Court held that the placing of the names of white and Negro jurors in the jury box on different colored slips of paper was such error as would require a new trial, where seasonably challenged, on the reasoning that,

> "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process. And, in view of the case before us; where not a single Negro was selected to serve on a panel of sixty—though many were available—we think that petitioner has certainly established a prima facie case of discrimination." *Avery* v. *Georgia*, supra (345 U.S. at 562).

The determinative factor in *Avery* is the *crucial stage* at which the different colored slips afforded an opportunity for discrimination. The slips are placed in the box to serve the function of affording a fair and impartial means of selecting the venires through the chance drawing of names for each term of court. This procedure by its nature is designed to be so conducted as to eliminate the element of conscious choice in the selection process. It takes place at the critical point when each panel for the coming term of court is in the actual process of being made up. Any distinguishing marks therefore tend to destroy the very element of chance which the drawing of names from a box is designed to achieve. As pointed out by Mr. Justice Frankfurter's concurring opinion in *Avery*, the openings in the jury

boxes were of sufficient size to enable the judge drawing the slips to distinguish their color. 345 U.S. at 564. In other words, the different colored slips injected "color" where it was peculiarly important that the selection process be color blind.

Such is not the case here, for the difference is between selecting the jury rolls, and selecting the venires. With respect to the former, involved in this case, the decisions of this Court place an affirmative duty on jury commissioners to consider race, for in no other way can they be sure that the jury consists of a cross-section of the community:

> "What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintances, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them." *Smith* v. *Texas,* 311 U.S. 128, 132, 85 L. Ed. 84 (1940).

And, in *Hill* v. *Texas,* 316 U.S. 400, 404, 86 L. Ed. 1559 (1942), this Court declared that it was the duty of jury commissioners, imposed by Section 4 of the Civil Rights Act of 1875, to make an "effort to ascertain whether there were within the County members of the colored race qualified to serve as jurors, and if so, who they were." In *Cassell* v. *Texas,* 339 U.S. 282, 94 L. Ed. 839 (1950), convictions were reversed because of failure of the jury commissioners to acquaint themselves with Negroes in the County in order to ascertain their qualifications. See also *Eubanks* v. *Louisiana,* 356 U.S. 584, 2 L. Ed. 2d 991 (1958), and *United States ex rel. Seals*

v. *Wiman*, 304 F. 2d 53 (C.A. 5th 1962), cert. den. 372 U.S. 924, 9 L. Ed. 2d 729 (1963).

Just recently, the Fifth Circuit alluded to this fact in *Brooks* v. *Beto*, ___ F. 2d ___, 35 L.W. 2077 (July 29, 1966), where it was said that "How then can it be said that conscientiously to do what the Constitution demands makes the result bad because race had been consciously considered to assure that race has not been the basis of discrimination?"

Moreover, any racial differentiation appearing on the tax digests would not give the jury commissioners any information they did not already have. While the process of drawing the venires from the box is intended to be rapid, routine, indiscriminate, and completely without regard to the identity of individuals, the making up of the jury lists is something entirely different. The former is purely a mechanical, impersonal operation. The latter is personal and deliberative. Georgia law imposes certain qualifications for jury service, such as that the juror be "experienced, intelligent and upright," Code §59-106, and that grand jurors be "above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent and upright persons . . ." Code §59-201.

For the jury commissioners to perform their duty in ascertaining these qualifications, they necessarily must either personally know or investigate each prospective juror, and in so doing, it is inevitable that they would either know or discover his racial identity. Moreover, in a county as small as Mitchell, it is unlikely that the commissioners would not already know the racial identity of each citizen. Two of the jury commissioners testified that

they knew all or most of the Negroes in their sections of the county. It is also significant to note that several of the jury commissioners were not even aware that the tax digests were kept separate. In *Brown* v. *Allen,* 344 U.S. 443, 480, 97 L. Ed. 469 (1953), it was held immaterial that the jury tickets of Negroes all had dots thereon, where it was seen that the drawing was always done by a child.

In the present case, there is no evidence to indicate that the separate tax digests actually encouraged any discrimination, or had any reasonable tendency to do so. Nor is there anything to indicate that the statute requiring separate digests, Code §92-6307, was ever intended to have this effect. Georgia law had long required that the names of jurors be taken from the county tax books, a not uncommon provision in many states. See Code of Georgia of 1882, §3910(b). It was not until 1894 that the predecessor of Code §92-6307 was enacted, with passage that year of a brief act limited to this section only. (Ga. Laws 1894, p. 31).

The legislative background of the Act of 1894 discloses that it was not designed to serve a discriminatory purpose. The 1890's were times of great political unrest in Georgia. The Populist Movement was sweeping the country and threatening to divide the Democratic Party in Georgia. At this time, no provision was made by Georgia law for the registration of voters, persons could vote at any election box in the county, often voted at more than one, and at the elections held in 1892, fraud was rampant on both sides. As one historian stated:

> "This election throughout the state was a pathetic example of the venality that too often accompanies the rule by the people. Negro voters were bought

and sold like merchandise and herded around the polls like so many cattle. They were fed at barbecues and made drunk and penned up to prevent them from voting, if they could not be otherwise controlled. Most of them who voted were in the hands of the regular Democrats." Coulter, *Georgia, A Short History*, p. 393 (1947).

Another commentator elaborates even further:

"Many of the planters, owners of turpentine stills, and other employers took their 'hands' to the polls and voted them in gangs. In some of the towns and cities, all-night revelries were held for the darkies on the night before election. Barbecue was served with whiskey and beer by the barrel. Next morning the dusky revelers were marched to the polls by beat of drums, carefully guarded lest some desert in search of another reward. In some of the cities bands of them were taken from one polling place to another and voted under different names. According to the testimony produced in the Watson-Black contested election case, Negroes were brought over from South Carolina in four-horse wagons and voted at various precincts in Augusta. The total vote in that city was double the number of legal voters, eighty per cent of it being Democratic. Somewhat similar methods were employed in the smaller towns. In the country, a considerable number of Populist precincts were thrown out on technicalities. The Democrats were not the only sinners, to be sure; but they were more resourceful, and hence more successful at the game." Alex Mathews Arnett, "The Populist Movement in Georgia," 7 Ga. Hist. Quart. 313, 332 (1923).

The immediate reaction was a demand for election reform. In his "State of the State" address to the 1894 General Assembly, Governor Northen called for a voter's registration law. House Jour. 1894, p. 42. Throughout the months of October and November, 1894, the *Atlanta Constitution* called for an election bill to insure that only qualified persons would be able to vote. See, e.g., issue of Sunday, November 4, p. 18. On November 6, 1894, an election was held at which widespread charges of vote frauds were again reported on both sides in connection with the Tenth District Congressional race in which Tom Watson lost his seat. See *Atlanta Constitution,* November 8, 1894, at p. 4; Id., issue of November 9, p. 4.

The result was passage of Georgia's first registration law (Ga. Laws 1894, p. 115). This Act was designed to insure (1) That only persons duly qualified by registration would be permitted to vote, and (2) That a voter would be permitted to vote only in the district of his residence. Throughout the Act, emphasis was placed on requirements which would enable the responsible officials to properly identify persons claiming a right to register to vote. Conversant with the particular problems previously experienced with Negro voters, the registration Act required identification by race, but it should be noted that the act imposed only purely objective requirements, the literacy requirement not appearing in the law until 14 years later in 1908 (Ga. Laws 1908, p. 27). Undoubtedly, this requirement was made necessary by the fact that traditionally many Negroes were named in honor of their former masters, and after emancipation, their employers.

Under the Constitution in existence at this time, only

those persons who had paid all taxes[5] due the state and county were permitted to vote (Const. of 1877, Art. II, Par. II; *McElreath on the Constitution of Georgia*, §854), and in order to facilitate identification of taxpayers from the tax records during the registration process, House Bill 141, which later became §92-6307, was introduced in the House of Representatives by Representative Rawlings on November 14, 1894 (House J. 1894, p. 230). The *Atlanta Constitution* of Thursday, November 15, 1894, at p. 7, reported the introduction of this bill as part of a story headed "Registration and Elections," which, after referring to the progress of the Voters' Registration bill, stated:

> "Another bill bearing upon qualifications of voters is by Mr. Rawlings of Washington. He provides that it shall be the duty of the tax receivers of the several counties to place the names of the colored taxpayers in each militia district upon the tax digest in alphabetical order and it is provided that the names of the colored and white taxpayers shall be made out separately on the tax digest.
>
> 'The occasion for that bill,' said Mr. Rawlings, 'is simply this: Under the present law there is no requirement of this kind and the tax receivers are in the habit of placing the names of the Negro taxpayers with those of the whites and it is impossible to find out with any degree of ease whether a Negro's name is on the tax digest. You see, it is pretty necessary to know this in election times. This is due

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[5]This related only to ad valorem taxes. The poll tax was not enacted until 1927 (Ga. Laws 1927, p. 57; Code of 1933, §92-108).

to the habit of placing a man's Negro employees with his name on the tax digest. For instance, Mr. Smith's property is returned and with his name is placed the names of the Negroes who work for him and whose names he gives in. My bill provides for separate lists of colored and white taxpayers and that each list shall be kept alphabetically.'"

The foregoing demonstrates that Code Sec. 92-6307 was never designed as a means of encouraging or facilitating discrimination. It was but part of a voters registration effort aimed at preventing vote frauds through voting by unauthorized persons. It could very easily serve the same function today, for many Negro citizens bear the same names as white citizens of their area. Notwithstanding, the General Assembly repealed this part of the law this year (Ga. Laws 1966, p. 393).

The assertion in the brief of petitioners that the act of 1894, and the Voters Registration Act passed the same year, was the "final solution to the problem of the Negro vote," and was "but one of the last entries on the journal of white supremacy" is simply not true, and petitioners do not cite a single authority, historical or otherwise, which so holds. These laws were aimed at fraud in elections, and merely because Negroes as well as white people played a role in the evil sought to be eliminated does not invest the problem with the aura of discrimination.

Respondent deems it also important to point out to the Court the effect of any such ruling as urged here. Under the rulings by the Fifth Circuit in *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71 (C.A. 5th 1959), *cert den.* 361 U.S. 838; *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53 (C.A. 5th 1962); *cert. den.,* 372 U.S. 924, 9 L. Ed. 2d 729 (1963); *Cobb* v. *Valkcom,*

339 F. 2d 95 (C.A. 5th 1964), and particularly the decision in this case, 333 F. 2d 496, it is virtually impossible for this issue to be waived, when challenged by federal habeas corpus. There are 4896 Negroes now confined in the Georgia prison system. If petitioners prevail on this question, there is not a single one of these prisoners who would not have to be retried. Such chaos should not be countenanced.

(4) Petitioners Should Not Be Set Free in the Event of Reversal.

As previously stated, respondent contends that petitioners failed to make out a case of discrimination, and that consequently the judgment below should be affirmed. However, since petitioners have argued that they should be set free in the event of reversal because of language in the decision of the Court of Appeals, 333 F. 2d 496, respondent will reply thereto.

The proper disposition where a state court conviction has been set aside on grounds of jury discrimination was stated by this Court in *Hill* v. *Texas,* 316 U.S. 400, 406, 86 L. Ed. 1559 (1942):

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements, where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the constitution prohibits the procedure by which it was obtained."

In *Patton* v. *Mississippi,* 332 U.S. 463, 469, 92 L. Ed. 76 (1947), it was further said:

> "As we pointed out in *Hill* v. *Texas*, 316 U.S. 400, 406, . . . our holding does not mean that a guilty defendant must go free. For indictments can be returned and convictions can be obtained by juries selected as the constitution commands."

And more recently, in *Eubanks* v. *Louisiana*, 356 U.S. 584, 589, 2 L. Ed. 2d 991 (1958), this Court declared:

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for the state may indict and try him again by the procedure which conforms to constitutional requirements."

The purpose of the direction in the decision of the Court of Appeals requiring that petitioners be retried within 8 months was obviously designed to prevent them from being detained indefinitely in jail on a non-bailable offense without ever being brought to trial. The Fifth Circuit did not intend to set a trap for the State. Forfeitures are no more favored when sought to be invoked against the state than against an accused. A serious and senseless crime has been committed. The perpetrators should not be set free simply because as petitioners claim, the jury commissioners bungled. There is no claim that petitioners have been prejudiced in any way by the delay. Indeed, it is a matter of common knowledge among lawyers that an accused stands in a more favorable position when his case is tried at a time remote to the date of the offense, after public indignation toward the offense has subsided. Added to this, the record below evinces an admirable spirit of cooperation on both sides with respect to stipulations concerning the admissibility of testimony of deceased witnesses.

The colorful language of petitioners' brief referring

to racial murders in Mississippi, the "totality of the system of segregated justice" in the South, the Selma marches, and an attempted justification of race riots, might well be appropriate were this case for decision by a lay jury composed of members of SNCC and the American Civil Liberties Union, but such arguments manifestly have no place before this Court. If the rights of petitioners in their case have been denied, they are entitled to relief. But they are not entitled to be set free simply because, as counsel contends, equal justice has not always been achieved in other areas. The answer for discrimination is to eliminate it, not to compound it by adding another even more invidious.

CONCLUSION

The case should be dismissed for lack of jurisdiction, certiorari having been improvidently granted. Otherwise, the judgments below should be affirmed.

Respectfully submitted,

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